IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Reshma Ram Vs State of Rajasthan
(1) D.B.CRIMINAL APPEAL NO.223/2001

Smt.Shanti Vs State of Rajasthan
(2) D.B.CRIMINAL APPEAL NO.197/2001

against the judgment dt.17.3.2001
passed by Addl.Sessions Judge No.1, Bikaner,
in Sessions Case No.76/2000.

Date of Judgment: April 26,2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE MANAK MOHTA

Mr.J.S.Choudhary)
Mr.Pradeep Choudhary)
Mr.P.N.Mohanani)
Mr.K.R.Bishnoi) for appellants.

Mr.Vishnu Kachhwaha, Public Prosecutor.

REPORTABLE BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. These two appeals are directed against the judgment dated 17.3.2001 passed by the learned Additional Sessions Judge No.1, Bikaner convicting appellants Reshma Ram and Smt.Shanti, wife of deceased Anopa Ram of offence under

Section 302 IPC and sentencing each of them to imprisonment for life and to pay a fine of Rs.500/- and in default of payment of fine, to further undergo one month's simple imprisonment.

2. The prosecution case as disclosed during the trial is that on 19.11.1999 at 12.30 P.M., P.W.4 Jagmala Ram submitted a written report at the Police Station, Bajju stating that his son Anopa Ram was mentally sick for the last 3-4 years. Inspite of all sort of treatment, his mental condition did not improve. He used to live with his family in a Dhani constructed on his field. In the morning, wife of Anopa informed him that at about 4 A.M., her husband went to the field to push deer & wild cows off the field but he accidentally fell in the water tank. When she went to fetch water in the morning, his dead body was found lying in the water. He went to the spot alongwith his son P.W.3 Manoher Lal. It was also stated that Anopa Ram died on account of accidental fall in the water tank being insane. On this information, police commenced enquiry under Section 174 CrPC. The police proceeded to the spot and prepared the site plan Ex.P.3 and Ex.P.3A. The inquest report Ex.P.7 was also prepared. The dead body was sent for post mortem. P.W.5 Dr.Satya Narain conducted the post mortem on the dead body of Anopa Ram vide Ex.P.10 and noticed

following injuries on his person:

> "1. Injury No.1 Abrasion 0.5cm x 0.3cm on chin anteriorly about 1.5cm left lateral to midline. Antemortem & fresh before death;
>
> 2. Injury No.2 Abraded contusion on muscle surface of left cheek 2cm x 2cm against I & II on left lower molars. Antemortem & fresh before death;
>
> 3. Injury No.3 Contusion 3cm x 1cm on tongue anteriorly near tip with swelling. Antemortem & fresh before death."

The doctor reserved the opinion stating that cause of death shall be ascertained after receipt of chemical examination report & diatom examination report, for which visceras were preserved and sealed. The dead body of Anopa Ram was entrusted to his father Jagmala Ram on the same day for funeral.

3. On 21.11.1999 at about 1 P.M., P.W.1 Shankerlal submitted a fresh report Ex.P.1 at the Police Station, Bajju stating inter alia that they were four brothers viz; Manoharlal, deceased Anopa Ram, Banwarilal and himself. They lived in Dhani in Chak 1 BJM. On 19.11.99, his elder brother Manoharlal informed that the dead body of Anopa Ram was lying in the tank of the field. The half of his body i.e. below waist was in the water. He rushed to the spot alongwith his wife. On enquiry, it revealed that wife of

Anopa Ram viz; Shanti was having illicit relations with the appellant Reshma Ram. As per his information, Mst.Shanti and Reshma Ram killed Anopa Ram and threw his body in the tank. On this information Ex.P.1, the police registered a case for offence u/s.302 IPC. Appellant Reshma Ram was arrested on 22.11.1999 vide Ex.P.14. At the same time, Mst.Shanti was also arrested on 22.11.99 vide Ex.P.5. At the time of arrest, she was carrying a female child of two and a half years. After usual investigation, the police laid chargesheet against the appellants for offence u/s.302 IPC. The appellants denied the charges levelled against them and claimed trial. The prosecution in support of the case, adduced oral & documentary evidence. Appellant Shanti in her statement under Section 313 CrPC denied the correctness of the prosecution evidence appearing against her. She stated that her husband was insane and he died on account of insanity. She denied the allegation of her illicit relations with appellant Reshma Ram. She pleaded innocence. Appellant Reshma Ram also denied the allegations of his illicit relations with Smt.Shanti and pleaded innocence. In defence, they examined D.W.1 Bhikha Ram and D.W.2 Kisna Ram. The learned trial Court discredited the testimony of P.W.1 Shankerlal, P.W.3 Manoherlal and P.W.4 Jagmala Ram with respect to extra judicial confession of Smt.Shanti. However, the learned Judge on the sole testimony of child witness P.W.2 Raja

Ram found the prosecution case proved. Accordingly, the learned Judge convicted and sentenced the appellants in the manner stated above.

4. Before we proceed to appreciate the sole testimony of child witness, P.W.2 Raja Raj, it would be convenient to acquaint with the broad features of the case by referring to the prosecution evidence in brief.

5. P.W.1 Shankerlal is the brother of deceased Anopa Ram. He reiterated the averments made in the written F.I.R. Ex.P.1 referred-to above. In addition, he stated that before the funeral took place, he alongwith his brother P.W.3 Manoherlal and father P.W.4 Jagmala Ram took Mst.Shanti into confidence and enquired about the cause of death of Anopa Ram. It was disclosed that she was having illicit relations with appellant Reshma Ram. On the fateful night, appellant Reshma Ram entered in the Dhani and tried to indulge in sexual intercourse with her, at that time her husband woke up and fired Reshma Ram. He also gave 3-4 slaps to him. He also kicked her. He also gave threatening to call his brother Shankerlal and make their relations public. He also gave a threatening of reporting the matter to the police. Her husband went out of the Dhani and proceeded towards the Dhani of Manoharlal. At that time, Smt.Shanti exhorted Reshma Ram to kill Anopa Ram. She

threw him on the ground and sat on his chest. Appellant Reshma Ram smothered his mouth as a result of which he died. Thereafter, both of them threw the dead body in the tank. The statements of P.W.3 Manoharlal and P.W.4 Jagmala Ram are almost on the same line.

6. P.W.6 Bala Ram and P.W.7 Phul Nath are formal police witnesses. They have given details of the investigation. P.W.8 Mahendra Kumar is the investigating officer. He has also given details of the investigation.

7. D.W.1 Bhikha Ram deposed that deceased Anopa Ram was insane. He also stated that he never heard about the illicit relations between Reshma Ram and Shanti. After funeral, he remained at the Dhani but at no stage, Mst.Shanti ever talked to Jagmala Ram, Manoharlal and Shankerlal. Similar is the statement of D.W.2 Kisna Ram. He also stated that for 3-4 days, Mst.Shanti was continuously weeping. There was no occasion for her to make the alleged extra judicial confession before her father in law and brother in laws.

8. It was argued before the trial Court that as per the statement of P.W.1 Shankerlal, P.W.3 Manoherlal and P.W.4 Jagmala Ram, Mst.Shanti made extra judicial confession on 19th November, 1999 itself. Thus, before funeral, there was

a considerable delay in filing the F.I.R. Ex.P.1 on 21.11.1999. The trial Court also found that the alleged extra judicial confession cannot be said to be voluntary as she was put under tremendous pressure by P.W.1 Shankerlal, P.W.3 Manoharlal and P.W.4 Jagmala Ram. Inspite of the fact that the alleged disclosure was obtained on 19th November itself before funeral, report incorporating said act was filed as late as on 21.11.1999 after due deliberations. The Court also noticed the number of infirmities in the alleged extra judicial confession. In the opinion of the trial Court, the evidence of these witnesses with respect to extra judicial confession was not credit-worthy. The finding is not challenged by the learned Public Prosecutor. On re-appreciation of entire evidence in that regard, we are in complete agreement with the trial Court as far as the finding with respect to the evidence of extra judicial confession is concerned.

9. Before we proceed to deal with the evidence of the child witness P.W.2 Raja Ram, it would be convenient to refresh the law in that regard.

10. Section 118 of the Evidence Act lays down that every person irrespective of his age, is competent to testify unless he is found incompetent due to the reason mentioned therein. Section 118 makes the understanding as the sole

test of competency of a witness, therefore, the competency of a child as to give evidence depends not only on his age but the degree of his understanding.

11. It will be useful to refer to some of the decisions of the Apex Court having bearing on the question relating to appreciation of evidence of a child witness.

12. In State of Bihar vs. Kapil Singh reported in AIR 1969 SC 53, the Apex Court observed as under:

> "While such a child witness can often be expected to give out a true version because of her innocence, there is always the danger in accepting the evidence of such a witness that under influence, she might have coached to give out a version by persons who may have influence on her. In this case, there are a number of circumstances which, in our opinion, indicate that it will not be quite safe to rely on her evidence."

13. Recently in Bhagwan Singh vs. State of M.P. Reported in AIR 2003 SC 1088, the Apex Court observed that the law recognizes the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The Court gave a caution that the evidence of child is required to be

evaluated carefully because he is an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration from other evidence to his testimony. Thus, the statement of the child witness is required to be scrutinized with extreme care and caution, when he is the only eye witness.

14. Keeping in view the aforesaid principles bearing on the question of appreciation of the statement of a child witness, we proceed to scrutinize the statement of P.W.2 Raja Ram, who is admittedly a child witness, being 10 years old.

15. The learned trial Judge in order to adjudge the competency of the child witness, put preliminary questions and got satisfied that the witness is capable of understanding and giving rational answers. He deposed that deceased Anopa Ram was his father. He identified the appellant Smt.Shanti as his mother. He also stated that appellant Reshma Ram was known to him. He resided at a distance of 100 pawandas from their field. He was a frequent visitor of their Dhani. He also stated that he alongwith his mother, father, brother & sister lived in the Dhani. On the fateful day, the entire family which included his father, mother, brother, sister & himself, was sleeping in the hut. When he woke up, he found Reshma Ram indulged in sexual intercourse with his mother. His father also woke

up. Appellant Reshma Ram was given a slap by his father. He also questioned appellant Reshma Ram for visiting his Dhani. His father also gave 2-3 kicks to his mother and questioned her for indulging in sexual intercourse with Reshma Ram. His father also told them that he would report the matter to his brothers Manoharlal and Shankarlal and make the matter public. On this, appellant Shanti exhorted Reshma Ram to kill his father Anopa Ram, else he would make a complaint of the incident. They killed him and threw his body in the tank. His mother threatened him that if he divulged the incident to anybody, he would also be killed. He further stated that his mother caught hold the legs of his father after throwing him on the ground and appellant Reshma Ram killed him by pressing his nose, mouth and neck. Out of fear, he did not raise the voice and remained silent. In the morning, his uncle P.W.3 Manohar arrived there. Another uncle P.W.1 Shankarlal arrived in the afternoon. His grand father also arrived there. In the cross-examination, he admitted that after the death of his father, he was living with his grand father Jagmal Singh. He also admitted that the police visited the place of incident on the next day. Before arriving the police, he did not talk to his uncle and grand father. His grand father used to tell that his father was killed by Reshma Ram and his mother. He also admitted that he was brought to the Court by his grand father. He further admitted that his grand father and the

uncle asked him to depose in the court that his father was killed by his mother and Reshma Ram. He also admitted that he obeyed the directions of his uncle and grand father. The incident which he witnessed, was not told to him by anybody else. He further admitted that outside the Court, his grand father made him understand that he should give the statement as whatever has been made him to understand. The relevant part of his statement is extracted as follows:

> " .....आज मुझे मेरे दादा जी लेकर आये हैं। मेरे दादा ने और ताऊ ने मेरे से यह कहा हैं कि कोर्ट में बयान हो तो यही कहना कि तेरे बाप को तेरी माँ और रेशमाराम ने मारा हैं। मैं अपने दादा और चाचा , ताऊ का कहना मानता हूं। आठ महीने पहले की बात हैं जो मैंनें अपनी आंखों से देखी हैं जो किसी ने बताई नहीं हैं। "

16. On careful consideration of the statement of P.W.2 Raja Ram, it clearly appears that he was tutored by his uncle and the grand father. Even otherwise, it is difficult to comprehend that in a small hut, where husband of Mst. Shanti alongwith three children was sleeping, appellant Reshma Ram could indulge in sexual intercourse with Mst.Shanti. As per Raja Ram, the hut could accommodate two cots & on the ground floor, 5-7 persons could sleep. The relevant part of the statement is extracted as follows:

> "झोपड़ी में दो माचे आ जायें इतनी बड़ी हैं परन्तु जमीन में 5-7 आदमी सो सकते हैं। मेरी माँ और मेरे बीच में मेरी छोटी बहन सो रही थी। "

17. The version given by the witness does not find corroboration from the medical evidence as well. The post mortem report does not disclose that deceased died of throttling. No reason has been given as to cause of death. The injuries on the person of deceased does not indicate that he died of homicidal death. The child witness, throughout the trial, remained and lived with the grand father and the uncle. He has admitted tutoring. The statement of the witness does not inspire confidence for more than one reasons. As already stated, it is improbable that in the presence of all members of the family in a small hut, a secret act of sexual intercourse could be performed. It is significant to notice that the witness also stated that he could witness the alleged act in the light of the lamp. It is difficult to comprehend that such act will be performed after lightening the lamp. Thus, we are of the view that he is a tutored witness and it is not safe to rely on his uncorroborated sole testimony. There is no other evidence to connect the appellants with the crime. The trial Court has committed gross illegality in convicting both the appellants on the sole testimony of child witness P.W.2 Raja Ram, which does not inspire confidence.

18. Consequently, both the appeals are allowed. The judgment of the learned Additional Sessions Judge No.1,

Bikaner dated 17.3.2001 is set aside. Both the appellants viz; Reshma Ram and Smt. Shanti are acquitted of the offence under Section 302 IPC. They shall be released forthwith, if not required in any other case.

(MANAK MOHTA), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS